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IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-1258

GEORGE S. HEITZLER, JR.
Petitioner,

v.

CINCINNATI BAR ASSOCIATION,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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May 4, 1973

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At page 1 and 2 of the brief filed by the Cincinnati Bar Association, in that portion of the brief that is supposed to contain the "statutory provisions involved," S. Ct. Rule 23 (d), the following *argument* appears:

> "At the time that the complaint in this matter was filed Rule XVIII was in effect and not Gov. Rule V as set forth in the petition. *** Rule XVIII is a well thought out, . . . rule . . . . Its efficacy should not be disturbed in any manner by this court."

This statement would tend to indicate that Petitioner has cited the wrong rule. The same assertion is made in Respondents' Brief, at page 10. Petitioner has cited

the correct rule. The precedessor to Rule V was in fact Rule XVIII, which dealt with the disciplining of attorneys and which was in effect when the complaint was filed (August 11, 1971); however as of February 28, 1972, the Supreme Court of Ohio renumbered the rules and Rule XVIII became Rule V. They are virtually verbatim.

Rule XVIII became Rule V dealing with the disciplining of attorneys. Rule XXI became Rule VI dealing with the sole and exclusive method of removing judges, all pursuant to the legislative mandate of the Ohio legislature. O.R.C. 2701.11 and 2701.12.

Whether we say Heitzler was improperly removed pursuant to Rule XVIII, now Rule V, dealing with attorneys, instead of being removed as a judge pursuant to the exclusive provisions of Rule XXI, now Rule VI, and O.R.C. 2701.11 and 2701.12, is a distinction without difference. He plainly was removed under the wrong rule. Due process of law demands removal if at all, under the right rule, which in this case was the Rule relating to judges, Rule XXI, now Rule VI.

Reference is respectfully made to Argument IV, pages 35-43 of the Petition where the *entire* problem presented by the improper removal proceedings is discussed.

At page 7 of its brief, the Cincinnati Bar Association levels an unwarranted attack upon counsel for the Petitioner that cannot go unanswered.

Petitioner at p. 30, N. 9 of the Petition argues that the Ohio disciplinary procedures for lawyers and

judges needs to be reviewed by the Supreme Court of the United States because the Ohio Supreme Court has just refused to reinstate John Ruffalo notwithstanding the decision of this Honorable Court in *In re Ruffalo*, 390 U.S. 544 (1964). This, cries the Cincinnati Bar Association, is an "audacious statement." In their brief they then boldly state that:

> "The state court proceedings [in *Ruffalo*] were never the subject of orders by this court. To make such a careless statement not only impugns the integrity of the Supreme Court of Ohio but is obviously a deliberate attempt on the part of petitioner to mislead this court." (Brief in Opposition, p. 7)

Counsel for the Cincinnati Bar Association apparently did not read Mr. Justice Douglas' statement in *Re Ruffalo* at 390 U.S. 544, 550 where he stated:

> "Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here *is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.'* Selling v. Radford, 243 U.S. 46, 61 L. Ed. 585, 587, 37 S. Ct. 377." (Emphasis added.)

The Cincinnati Bar Association likewise completely misread the holding of this Honorable Court: viz that Ruffalo had no notice that the additional charge would be leveled against him until *after* he had given testimony in the *state* proceedings. Mr. Justice Douglas concluded at 390 U.S. 544, 551, 552:

> "How the charge would have been met had it been originally included in those leveled against

petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

Therefore a careful reader concludes that the state court proceedings were so infected with a lack of procedural due process that no federal disbarment could follow. Despite this clear and concise pronouncement from the Highest Court of this country, the Supreme Court of Ohio has denied the petition for reinstatement filed by John Ruffalo. Petition, p. 30, N. 9.

Petitioner again asserts that "the disciplinary procedures for lawyers and judges in the State of Ohio needs to be reviewed by this Honorable Court."

At page 8 of its brief, the Cincinnati Bar Association makes the rather startling admission that:

"Nowhere in the rules of procedure of the Supreme Court [of Ohio] are there any provisions wherein the petitioner must be given the right to attack the findings of fact and recommendations of a hearing board [sic! should be hearing *panel*] prior to the filing of the recommendations with the Supreme Court of Ohio." (Emphsis added.)

Petitioner submits that the above-quoted provision is a clear cut admission of the obvious and utter lack of procedural due process infecting all Ohio disciplinary proceedings.

The logical outcome arising from the Cincinnati Bar Association argument is that the Bar Associations in Ohio are free to dredge up whatever charges they choose, file them, and after hearings, the 3-man Hearing Panel *and then* the 17-man Board of Commissioners have untrammeled freedom to make whatever factual findings and recommendations they choose, all without notice, hearing or objections by a judge. The unfortunate judge is "sidelined" while all the crucial factual findings and recommendations are made, and then, and only then, is the unfortunate judge first allowed to object.

Procedural due process demands far more. See the Petition, pp. 30-34.

At page 10 of its brief, the Cincinnati Bar Association seems to say that Petition via his counsel agreed and voiced no objection to proceeding under Rule XVIII (now Rule V) rather than Rule XXI (now Rule VI). Thereafter on p. 12 of the brief the Bar Association cites *Forsyth* v. *Hammond*, 166 U.S. 506 (1897) for the proposition that where both parties have appeared in a case and participated in it, the issue of jurisdiction may not be questioned. *Such an assertion is decidedly wrong.* First, this Honorable Court has unequivocally held that neither the failure to object nor the consent of the parties to a suit can confer *subject matter jurisdiction* on a court. See eg: *Metcalf* v. *City of Watertown*, 128 U.S. 586 (1888). Exactly that issue is presented here. There is little question that the *personal jurisdiction* over Heitzler was effective since he filed an answer. However, if he was removed from office pursuant to the wrong rule, then this clearly deals with subject matter jurisdiction.

Second, the Bar Association's reliance upon *Forsyth* v. *Hammond*, 166 U.S. 506 (1897) is completely misplaced. The precise issue there dealt with an attempt to collaterally review city annexation proceedings in the federal courts when in fact the state's highest court had already rendered a final decision upholding the annexation. However, the Seventh Circuit ruled that the annexation was invalid. A clear conflict between the decision of the Indiana Supreme Court and the Seventh Circuit Court of Appeals was presented.

The plaintiff, Forsyth, had participated in the state proceedings including the appeal to the Indiana Supreme Court. Justice Butler ultimately ordered the suit dismissed, and at 166 U.S. 506, 517 asked,

> "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal acting independently, and having no appellate jurisdiction?"

No independent forum is involved in the case at bar. No collateral review is sought. No problems of *res judicata* are involved. This Honorable Court, should it grant Certiorari, unquestionably has the power to review the disciplinary decision of the Supreme Court of Ohio. The reliance on *Forsyth* by the Bar Association is clearly wrong.

At page 11 of their brief, the Cincinnati Bar Association seems to say that the Amendment to Art. IV, Section 2 of the Ohio Constitution justifies the removal of a *judge* under disciplinary procedures for *attorneys* for alleged violations of Canons of *Judicial* Ethics.

Neither the language of the amendment, nor due process of law sustain such an untenable position.

Petitioner does not challenge the power of the highest court of any state to conduct appropriate disciplinary proceedings according to appropriate procedures. We do respectfully submit that where a well defined, precise and exclusive procedure is provided first by the legislature of the State of Ohio, O.R.C. 2701.11 and 2701.12, and later by rule of the Supreme Court itself, (Rule XXI, now Rule VI, for the removal of judges) then a judge can only be removed from office for alleged violations of Canons of Judicial Ethics by that well defined, precise and exclusive procedure. He cannot be removed as a *judge* for alleged violations of *judicial* ethics pursuant to rules for disciplining *attorneys*. (Notably, the Cincinnati Bar Association could find no authority other than the *Franko* case, the inapplicability of which has previously been discussed and reference is respectfully made to pp. 35-43 of the Petition for the appropriate authorities.)

At page 16 of its brief, the Cincinnati Bar Association states:

> "The reason that the affidavits [denying the knowledge by Heitzler of the use of his name by Harmony Loan Company] are uncontradicted is that respondent at no time had the opportunity to contradict them."

This is *not true*.

The affidavits referred to appear in Petitioner's Appendix at pp. A-98 and A-99. They were filed along

with the Motion to Quash filed October 17, 1972 (Appendix, p. A-74-105). Oral argument before the Ohio Supreme Court was held on November 15, 1972, a month later, and the decision was rendered December 15, 1972. No motion to strike was filed by the Bar Association. No counter affidavits or exhibits, or any form of contradictory evidence was offered by the Bar Association. (Yet they had almost two months to attack them, if they desired, between the time they were filed and the time of the decision of the Ohio Supreme Court.)

The affidavits became part of the record when filed with the Motion to Quash. The Supreme Court of Ohio considered the affidavits and with no comment concerning their propriety denied the Motion to Quash. (Appendix, p. A-134). The only conclusion to be drawn is that the uncontradicted affidavits denying prior use of Judge Heitzler's name are true.

The Bar Association's anemic objection is untimely, unmeritorious, and utterly inappropriate.

At page 20 of the brief of the Cincinnati Bar Association a blatant and serious misstatement appears. It reads:

> "Mr. Spampinato hit the nail on the head, T. 719, when he said it was an honor to have these dignitaries like Judge Heitzler on the Board. *It was good advertising as well as being an honor.*" (Emphasis added.)

The actual transcript at T-719 makes *no reference whatsoever to advertising.* In response to the question

inquiring why four more or less inactive members were on the Board of Directors of Harmony Loan, Mr. Spampinato stated:

> "Because we needed a nice Board of Directors and I think it was an honor for us to have such dignitaries like these people as we had as directors."

Counsel for the Bar Association has read into the evidence an unwarranted distortion and added the statement about advertising. This is crucial because it not only casts grave doubt on the entire argument set forth in the Bar Association brief, but as appears below, misstatements and the innuendoes are repeated again. Furthermore, part of the case against Petitioner dealt with whether or not he permitted the power of his office or the influence of his name to assist the business of another. Petitioner has contended all along the charges were unwarranted. See the argument in the Petition, pp. 53-60.

At page 22 of the brief filed by the Cincinnati Bar Association, Judge Heitzler is accused of being under the influence of "cronyism," and in the paragraph preceeding this accusation it is stated:

> "Mr. Crisci [Chief Referee in the Domestic Relations Court] and Mr. and Mrs. Stone [an attorney who has appeared before Judge Heitzler] accompanied Judge Heitzler to Majorca. They were in the same 'group.'"

Respondent seems to have forgotten that the Majorca trip was sponsored by the Ohio State Bar Association.

T-18. Petitioner is now apparently being condemned for "cronyism" because he went on a Bar Association sponsored trip to Spain at which many other lawyers and wives were present.

At page 23, the Cincinnati Bar Association again misstates the evidence. Heitzler testified that he ate both at the Hangar Restaurant *and* at Wong's Chinese Restaurant. T-35,36. The regular luncheons at the Hangar lasted "approximately a *year*," not a year and a half as the Bar Association contends. T-36. Included in the luncheon group were *not only* Dr. Stone, *but also* Judge Mathews, Judge Chase Davies, Police Chief Schott, Mr. Peter Donohue from Heitzler's own office and Mr. Crisci and Mr. Swallow — again the Bar Association has misstated the evidence.

Furthermore, the Bar Association then sets out a text book example of a "non-sequitur". Because Dr. Stone was a friend of Heitzler (T-1201) then this intimacy and friendship supposedly led a bartender in a cafe (The Side Door - not the Hangar or Wong's) to allegedly recommend that Matlock hire Dr. Stone because he could get somewhere with Heitzler. T-180-187. The conclusion does not follow from the evidence.

Not only is the conclusion unsubstantiated by the evidence, but the only reference to "get[ting] someplace with Judge Heitzler" appears at T-187 and does *not* refer to "get[ting] someplace with Judge Heitzler" at all, but refers instead to "moving" the case faster than it had been previously. T-187. *Judge Heitzler's name is not even mentioned there.* Also, it is cru-

cial to note that the reasons why Dr. Stone allegedly could "move" a divorce case faster than Matlock's then counsel were objected to as hearsay and said objections were properly sustained. T-187-193. Petitioner submits that counsel for the Respondent has now gone beyond the very record itself into evidence which was objected to and which objections were sustained and in his very brief to this Honorable Court attempts to infer that Dr. Stone could influence Petitioner - an unwarranted and serious innuendo. The certified transcript of the Hearing testimony was sent to this Honorable Court and reference is respectfully made to T-180-190 for the full account of this highly inappropriate and unfounded argument by Respondent.

At page 27 of its brief, the Cincinnati Bar Association cites the testimony of Arthur J. Schuh, the collection attorney for Harmony Loan. T-337. Recall the Bar Association has charged, and the Ohio Supreme Court has found Heitzler guilty of lending the power of his office or the influence of his name to promote the business of Harmony Loan. Yet when the attorney who performed the collection work for Harmony Loan was asked:

> "Q What persons, to your knowledge, as of 1966 had any association with Harmony Loan?"

the following answer was given,

> "A The only one I knew that had any actual connection with them was Mr. Spampinato." (T-339).

Further Schuh testified at T-340:

> "Q . . . : at any time during your representation of the Harmony Loan Company were you ever aware that Judge Heitzler was a Director of that Company?"
>
> "A No, I was never told this."

The above quoted testimony (appearing as quoted and *not* at T-344 as the Bar Association states) utterly destroys the charge that Heitzler was allowing the power of his name or the influence of his office to aid the business of another. If the lawyer who handled the collections for Harmony Loan did not know Heitzler was connected with it, then it is impossible for Heitzler to have loaned the power of his office or the influence of his name to promote the business of Harmony. Hence no evidence existed upon which to base this finding of guilt.

At page 31 of its brief, the Cincinnati Bar Association makes the following flagrant misstatement concerning the record in this case:

> "It is the height of impertinence on the part of petitioner's counsel to seek to make part of the record in this case by a *motion to quash* filed in the Supreme Court of Ohio the affidavit of Rufus 'Snowshoe' Smith as to why he took the Fifth Amendment[1] when called to testify at the hearing before the panel and the affidavit of his alleged attorney as to why Rufus 'Snowshoe' Smith took the Fifth Amendment." (Emphasis added.)

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[1]Rufus Smith also denied any complicity in an alleged bribery incident that was the subject of testimony during the hearings. See Appendix, pp. A-116, 117.

First, the record clearly shows that the affidavits were filed as a part of Petitioner's *Objections to The Findings of Fact and Not the Motion to Quash.* Appendix, pp. A-116 - A-118 and 106 to 119.

Second, the Objections were filed on October 20, 1972 and oral argument was held approximately a month later on November 15, 1972. No motion to strike was ever filed. The only logical conclusion is that these affidavits, now of record, are true. Respondent's objection thereto is untimely and unmeritorious.

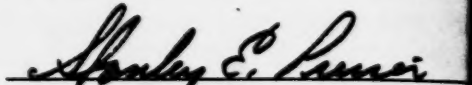
At page 32 of its brief, the Cincinnati Bar Association states that Rufus Smith "was hired for political reasons." The evidence supposedly supporting such statement appears on page 34 of the brief where witness Henry's testimony is quoted. Henry did not say Rufus Smith *was* hired for political reasons. He did say "I assumed that he was there for political reasons and that they were good and sufficient." However, the next quoted paragraph of Henry's testimony shows why Smith was hired and we quote from Respondent's brief, page 34:

> "Mr. Henry: Thank you. That is what I understand the whole thing to be. 'If you don't want another riot, Baby, get me a job.'"

It is well remembered in the Cincinnati community that racial riots occurred there some few years ago. It is also well known that Judge Heitzler helped quell such disturbances. If Rufus Smith was hired to prevent riots in "the colored community" then Judge Heitzler should

be lauded for his good judgment rather than criticized. Once again the Cincinnati Bar Association has failed to consider all the evidence.

For all the reasons set forth in the Petition, and those set forth in this Reply Memorandum, Certiorari should be granted.



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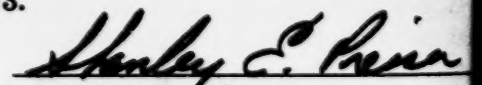
CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Petitioner's Reply Memorandum upon R. O. Klausmeyer, Esquire 2900 DuBois Tower, Cincinnati, Ohio 45202; John J. Getgey, Esquire, 615 Provident Tower, Cincinnati, Ohio 45202 and upon C. Donald Heile, Esquire, 3005 Carew Tower, Cincinnati, Ohio 45202, Counsel for the Cincinnati Bar Association, by depositing same in the United States mail, postage prepaid by air mail, this 4th day of May, 1973.



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